

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN**

**DETROIT INTERNATIONAL BRIDGE  
COMPANY**

**Plaintiff,**

**CIVIL ACTION NO. \_\_\_\_\_**

**v.**

**FEDERAL HIGHWAY ADMINISTRATION  
an agency of the United States Department of  
Transportation, and James Steele, in his capacity  
as Michigan Administrator for the Federal Highway  
Administration and as the Freedom of Information  
Compliance Officer for the  
Federal Highway Administration,**

**Defendants.**

\_\_\_\_\_ /

**COMPLAINT**

Plaintiff, Detroit International Bridge Company, states as follows for its  
Complaint:

**INTRODUCTION**

This action is brought to prohibit the public disclosure by the Federal Highway Administration of non-public, confidential information, the disclosure of which threatens the security of an asset designated by the United States as a Critical Infrastructure within the meaning of the *Critical Infrastructures Protection Act of 2001*, 42 U.S.C. §5195c et seq.

**PARTIES, JURISDICTION AND VENUE**

1. Plaintiff Detroit International Bridge Company is a Michigan corporation with its registered office located at 12225 Stephens Road, Warren, Michigan 48989.

2. Defendant Federal Highway Administration is an agency of the United States Department of Transportation.

3. Defendant James Steele is the Michigan Administrator for the Federal Highway Administration and the designated compliance officer of the Federal Highway Administration responsible for the agency's compliance with the Freedom of Information Act.

4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §1331 because Plaintiff DIBC's claims arise under the laws of the United States including the Freedom of Information Act, 5 U.S.C. §552, and the Critical Infrastructures Protection Act of 2001, 42 U.S.C. §5195c et seq.

5. This Court has supplemental jurisdiction over the state law-based claim pursuant to 28 U.S.C. § 1367.

6. Venue is proper in this Court under 28 U.S.C. §1391(e) because Defendant Federal Highway Administration is an agency of the United States that maintains an office within this District at 315 W Allegan St # 211, Lansing, Michigan.

#### **COMMON FACTUAL ALLEGATIONS**

7. As a consequence of the attack of September 11, 2001, it became apparent that a wide variety of critical assets – both governmental and privately-owned – are essential to the continuing functionality and economic viability of the nation and the incapacity or destruction of such assets would have a debilitating impact on national physical security, national economic security, and public safety.

8. Following 9/11, Congress determined that these “critical infrastructures” warranted greater protection than had previously been afforded, and that all necessary steps should be taken to avoid the incapacity or destruction of these assets.

9. Congress subsequently enacted the *Critical Infrastructures Protection Act of 2001*, 42 U.S.C. §5195c et seq. (effective October 26, 2001).

10. The Ambassador Bridge is North America’s busiest border crossing and represents a critical link between the United States and Canada and a critical component of their respective economies.

11. The Ambassador Bridge carries over twenty five (25%) percent of the annual trade between the United States and Canada.

12. The Ambassador Bridge has thus been designated as one of those privately-owned assets identified as a “critical infrastructure” by the United States through the Department of Homeland Security, the State of Michigan through the Department of State Police, and the City of Detroit.

13. The Ambassador Bridge is a Critical Infrastructure within the meaning of the Critical Infrastructures Protection Act of 2001, 42 U.S.C. §5195c et seq.

14. Detroit International Bridge Company, as the owner of a critical infrastructure facility, is obligated to undertake responsibility for implementing the federal policy to protect the Ambassador Bridge which requirement includes maintaining the confidentiality of inspection reports relating to the Ambassador Bridge.

15. On April 23, 2004, DIBC and the Michigan Department of Transportation entered into that agreement entitled Ambassador Gateway Project Agreement, a copy of which is attached as Exhibit “A.”

16. Pursuant to paragraph 28 of the 2004 Gateway Agreement, DIBC agreed to conduct certain inspections of the Ambassador Bridge in conformance with the standards established by 23 CFR Part 650 National Bridge Inspection Standards.

17. The parties agreed and the 2004 Gateway Agreement therefore acknowledges that the inspection reports, “contain sensitive security information, the public disclosure of which would be contrary to the public interest, and that, subject to the ultimate authority of the courts, the reports are exempt from public disclosure under the terms of the Freedom of Information Act.”

18. Acknowledgement of the confidential and sensitive security information contained within the reports, and the parties’ agreement to maintain the confidentiality of those reports, is consistent with the status of the Ambassador Bridge as a “critical infrastructure” within the meaning of the *Critical Infrastructures Protection Act of 2001*, 42 U.S.C. §5195c et seq. (effective October 26, 2001) and the obligations of DIBC (and MDOT) under that Act.

19. The agreement upon confidentiality and exemption from the Freedom of Information Act of the 2007 Inspection Report, is required by the *Critical Infrastructures Protection Act of 2001*, 42 U.S.C. §5195c et seq.

20. DIBC has conducted the required inspections, and has provided to MDOT the completed reports as required by the 2004 Gateway Agreement.

21. Among other inspections, DIBC conducted the required inspection in 2007, and provided the completed report (the “2007 Inspection Report”) to MDOT as required.

22. The 2007 Inspection Report was marked as “confidential” in accordance with the requirements of the 2004 Gateway Agreement and the requirements of 42 U.S.C. §5195c et seq.

23. The parties anticipated that the completed reports might be shared with the Federal Highway Administration, subject to the confidentiality provisions set forth in the 2004 Gateway Agreement and the proscriptions of and policies embodied in *Critical Infrastructures Protection Act of 2001*.

24. MDOT provided the completed 2007 Inspection Report to Defendant Federal Highway Administration; provision of the 2007 Inspection Report to the Federal Highway Administration, and the Federal Highway Administration's receipt of the 2007 Inspection Report, was subject to the continued confidentiality of that report, and to the exemption from public disclosure pursuant to the Freedom of Information Act.

25. DIBC has been advised that the Federal Highway Administration has received a request for disclosure of the 2007 Inspection Report.

26. DIBC was advised by counsel for the Federal Highway Administration on September 25, 2009, that the Federal Highway Administration intends to publicly disclose the 2007 Inspection Report, despite the threat to national security by the threatened disclosure.

27. The threatened disclosure of the 2007 Inspection Report is a violation of the confidentiality obligations of the Federal Highway Administration as a recipient of that 2007 Inspection Report.

### **COUNT I**

#### **THREATENED VIOLATION OF 5 U.S.C. §552 (FOIA)**

28. The allegations set forth in paragraphs 1-27, above, are incorporated by reference as if fully set forth herein.

29. The 2007 Inspection Report contains commercial and financial information obtained from DIBC, which information is confidential.

30. The 2007 Inspection Report is therefore exempt from disclosure pursuant to 5 U.S.C. §552(b)(4).

31. The contracting parties, DIBC and the governmental unit, MDOT, agreed (a) that the inspection reports are confidential, for the reason that they contain sensitive security information, and that they are exempt from public disclosure pursuant to the Freedom of Information Act, and (b) that the government would assert, in response to any FOIA request(s), that the inspection reports were exempt from public disclosure.

32. As an agent of MDOT and as a governmental body, the Federal Highway Administration is bound to the agreement and acknowledgement that the inspection reports, including but not limited to the 2007 Inspection Report, contain confidential commercial information and that they are exempt from public disclosure pursuant to the Freedom of Information Act; and is equally obligated to assert in response to any FOIA request(s) that the inspection reports are exempt from public disclosure.

33. The 2007 Inspection Report is not subject to public disclosure pursuant to the Freedom of Information Act.

34. The Federal Highway Administration has threatened to publicly disclose the 2007 Inspection Report, in violation of 5 U.S.C. §552(b)(4).

## **COUNT II**

### **THREATENED VIOLATION OF 42 U.S.C. §5195c**

35. The allegations set forth in paragraphs 1-34, above, are incorporated by reference as if fully set forth herein.

36. The Federal Highway Administration and its employees and agents, including the FOIA Compliance Officer, are subject to the policies established by the *Critical Infrastructures Protection Act of 2001*, 42 U.S.C. §5195c et seq.

37. 42 U.S.C. §5195c(c)(1) establishes, as a policy of the United States, that “any physical or virtual disruption of the operation of the critical infrastructures of the United States be rare, brief, geographically limited in effect, manageable, and minimally detrimental to the economy, human and government services, and national security of the United States.”

38. 42 U.S.C. §5195c(c)(2) establishes, as a policy of the United States, that “actions necessary to achieve the policy stated in paragraph (1) be carried out in a private-public partnership involving corporate and non-governmental organizations.”

39. In furtherance of the policy of the United States, DIBC agreed to make available to MDOT and the Federal Highway Administration certain inspection reports, including the 2007 Inspection Report.

40. The inspection reports, including the 2007 Inspection Report, are confidential and contain sensitive security information the public disclosure of which could threaten the security of the Ambassador Bridge, which has been designated as a Critical Infrastructure.

41. The Federal Highway Administration has threatened to publicly disclose the 2007 Inspection Report, in violation of its duties under the policy established by the *Critical Infrastructures Protection Act of 2001*, 42 U.S.C. §5195c et seq.

### **COUNT III**

#### **BREACH OF CONTRACT**

42. The allegations set forth in paragraphs 1-41, above, are incorporated by reference as if fully set forth herein.

43. The 2004 Gateway Agreement is a binding contract between the parties.

44. The Federal Highway Administration is, to the extent it is permitted to receive and review the inspection reports prepared by DIBC and provided to MDOT pursuant to that agreement, an agent of MDOT.

45. As an agent of MDOT, the Federal Highway Administration is bound to the terms and conditions of that agreement including, but not limited to, the maintenance of the confidentiality of the inspection reports.

46. The Federal Highway Administration has threatened to publicly disclose the 2007 Inspection Report.

47. The threatened public disclosure of the 2007 Inspection Report constitutes an anticipatory breach of the 2004 Gateway Agreement.

48. DIBC (and the nation) will suffer irreparable harm if the Federal Highway Administration publicly discloses the 2007 Inspection Report, which report contains sensitive security information, the public disclosure of which would be contrary to the public interest.

**WHEREFORE,** Plaintiff Detroit International Bridge Company prays that this Court enter its Order:

- A. Declaring and adjudging that the 2007 Inspection Report is and all other inspection reports are confidential, non-public documents subject to an exemption from disclosure pursuant to 5 U.S.C. §552(b)(4);
- B. Declaring and adjudging that the receipt by the Federal Highway Administration of the 2007 Inspection Report, is receipt by the Federal Highway Administration as an agent of MDOT, and that the Federal Highway Administration is bound with MDOT to the confidentiality provisions set forth in the 2004 Gateway Agreement and the requirement that the governmental agency advise any party who seeks such document pursuant to a Freedom of Information Request that the document is exempt from disclosure;



- C. Declaring and adjudging that public disclosure by the Federal Highway Administration of the 2007 Inspection Report would violate the *Critical Infrastructures Protection Act of 2001*, 42 U.S.C. §5195c et seq;
- D. Declaring and adjudging that the threatened disclosure by the Federal Highway Administration of the 2007 Inspection Report constitutes an anticipatory breach by the Federal Highway Administration of its obligations as an agent of MDOT under the 2004 Gateway Agreement;
- E. Permanently enjoining the public disclosure by the Federal Highway Administration, or anyone acting on its behalf or at its direction, of the 2007 Inspection Report and any other inspection report by DIBC pursuant to the 2004 Gateway Agreement;
- F. Awarding in favor of Plaintiff and against the Defendants those costs, including reasonable attorneys fees, incurred in bringing this action; and
- G. Awarding such other relief as may be just and equitable under the circumstances.

Respectfully submitted,

NEDELMAN GLOETZNER, PLLC

By: /s/ Michael A. Nedelman

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